

FILE COPY

SUPREME COURT OF THE UNITED STATES

CITIZENS BANK OF NEW YORK

No. 400

**TRUST UNDER AGREEMENT DATED SEPTEMBER 10, 1901,
BY JOHN E. ANDERSON, DECEASED (TRUSTEES OF THE
CENTRAL HANCOCK BANK AND TRUST COMPANY),
HAMISH F. ANDERSON, AND WILLIAM H. PARKER,
TRUSTEES,**

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
CIRCUIT COURT OF APPEALS FOR
THE SECOND CIRCUIT.**

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INDEX.

	PAGE
Background and Jurisdiction	1
Questions Presented	2
Applicable Provisions of Internal Revenue Code (26 U. S. C. 1940 ed.)	2
Statement	4
Reasons for Granting the Writ	5
(1) The lower courts are now in disharmony; and the decision of the Circuit Court of Appeals is a flagrantly incorrect interpretation of the law.	6
(2) The decision flies in the face of the holdings by the Supreme Court with regard to deductions where charity is involved	8
(3) The decision flies in the face of holdings by the Supreme Court about cases that are pecu- liarily within the authority of the Tax Court... .	10
(4) This case is an important one involving, as it does, every estate and trust in which charity is a beneficiary and where capital gains are realized	13

TABLE OF CASES CITED:

<i>American Coast Line v. Commissioner</i> , 159 F. (2d) 665 (C. C. A. 2)	11, 12
<i>Brooklyn National Corporation v. Commissioner</i> , 157 F. (2d) 450 (C. C. A. 2) cert. den. 67 S. Ct. 96	10, 11, 12
<i>Commissioner v. Wiesler</i> , 161 F. (2d) 997	12
<i>Crane v. Commissioner of Internal Revenue</i> , 67 S. Ct. 1047	12
<i>Dobson v. Commissioner</i> , 320 U. S. 489	2, 10, 12

	PAGE
<i>Green v. Commissioner</i> , 7 T. C. 263	7, 8
<i>Grey v. Commissioner</i> , 41 B. T. A. 234, aff'd 118 F. 2d 153	7, 8
<i>Helvering v. Bliss</i> , 293 U. S. 144	9
<i>Maloy v. Commissioner</i> , 45 B. T. A. 1104	7, 8
<i>Old Colony Trust Co. v. Commissioner</i> , 301 U. S. 379...	9
<i>Whitehead, J. B., Estate of</i> , 3 T. C. 48	8

OTHER AUTHORITIES CITED:

Internal Revenue Code (26 U. S. C. 1940 ed.):

Section 22	2, 6, 7, 8
Section 23	3, 7
Section 111	3, 6
Section 117	3, 4, 6, 7
Section 162	4, 6, 8, 9
Section 163	7
Section 722 (d)	11

Judicial Code as amended by the Act of February 13, 1925, Section 240(a)	1
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1947.

No.

TRUST UNDER AGREEMENT DATED DECEMBER 30, 1921
BY JOHN E. ANDRUS, DECEASED (TRUST No. 1),
CENTRAL HANOVER BANK AND TRUST COMPANY,
HAMLIN F. ANDRUS, and WILLIAM H. TAYLOR,
Trustees,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
CIRCUIT COURT OF APPEALS FOR
THE SECOND CIRCUIT.**

Background and Jurisdiction.

Petitioners, by J. S. Seidman, their counsel, pray that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit, entered in the above entitled case on July 24, 1947, reversing the decision of The Tax Court of the United States.

The opinion of the Circuit Court of Appeals is reported at — F. (2d) —. The opinion of the Tax Court is reported at 7 T. C. 573.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

Questions Presented.

(1) The tax statute allows a trust to deduct any part of the *gross* income, without limitation, that goes to charity. Is that deduction in any way limited by the fact that in computing *net* income (as distinguished from gross income), only part of the long term capital gains of the trust is taken into account? The Tax Court held that the charity deduction is not so limited. The Circuit Court of Appeals ruled the opposite, and as a result allowed less for the charity deduction than actually paid.

(2) Is this a case, as petitioners maintain, peculiarly within the authority of the Tax Court and a proper one in which to apply the principle laid down in *Dobson v. Commissioner*, 320 U. S. 489, that the Tax Court should be upheld if its decision is warranted in the record and reasonable in the law? This point was briefed and argued to the Circuit Court of Appeals by both parties. That court, in rendering its opinion, made no mention of it at all.

Applicable Provisions of Internal Revenue Code (26 U. S. C. 1940 ed.).

SEC. 22. GROSS INCOME.

(a) *General Definition*.—"Gross income" includes * * * gains or profits and income derived from any source whatever.

(f) *Determination of Gain or Loss*.—In the case of a sale or other disposition of property, the gain or loss shall be computed as provided in section 111.

SEC. 111. DETERMINATION OF AMOUNT OF, AND
RECOGNITION OF, GAIN OR LOSS.

(a) *Computation of Gain or Loss.*—The gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the adjusted basis provided in section 113 (b) for determining gain, * * *

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions: * * *

(g) *Capital Losses.*—

(1) *Limitations.*—Losses from sales or exchanges of capital assets shall be allowed only to the extent provided in section 117.

SEC. 117. CAPITAL GAINS AND LOSSES.

(a) *Definitions.*—As used in this chapter * * *

(4) *Long-Term Capital Gain.*—The term “long-term capital gain” means gain from the sale or exchange of a capital asset held for more than 18 months, if and to the extent such gain is taken into account in computing *net income*; (italics supplied)

(b) *Percentage Taken Into Account.*—In the case of a taxpayer, other than a corporation, only the following percentages of the gain or loss recognized upon the sale or exchange of a capital asset shall be taken into account in computing *net income*: (italics supplied)

100 per centum if the capital asset has been held for not more than 18 months;

66 $\frac{2}{3}$ per centum if the capital asset has been held for more than 18 months but not for more than 24 months;

50 per centum if the capital asset has been held for more than 24 months.

SEC. 162. NET INCOME.

The net income of the estate or trust shall be computed in the same manner and on the same basis as in the case of an individual, except that—

(a) There shall be allowed as a deduction (in lieu of the deduction for charitable, etc., contributions authorized by section 23 (o)) any part of the *gross income*, without limitation, which pursuant to the terms of the will or deed creating the trust, is during the taxable year paid or permanently set aside for the purposes and in the manner specified in Section 23 (o), or is to be used exclusively for religious, charitable, scientific, literary, or educational purposes * * *. (italics supplied)

Statement.

This is an income tax case involving the year 1941. Petitioners are trustees under a trust whereby 45% of the income, and on termination of the trust, 45% of the principal goes to a charitable organization.

In 1941, the trust had a net income of \$82,000. (All figures are in round amounts for convenience.) Of this, 45%, or \$37,000, went to the charitable organization. The \$82,000 consisted of \$85,000 of net long term capital gains, less \$3,000 of expenses in excess of ordinary income.

Petitioners, in their 1941 return, deducted the \$37,000 paid to the charitable organization. Respondent allowed only \$18,000. His theory was that since only part of the capital gains is taken into account in computing taxable net income, the deduction for the charity should be proportionately reduced.

The Tax Court held that there was no justification in statute, reason, or precedent for the claimed restriction of the deduction. To the contrary, the Tax Court pointed out that it would do violence both to the letter of the law, and to the intended spirit of encouragement of donations by trust estates, if the deduction were to be curbed in the way the government sought.

The Circuit Court of Appeals reversed the decision of the Tax Court and ruled that only \$18,000 was deductible of the \$37,000 paid to the charitable organization.

Reasons for Granting the Writ.

The reasons for granting the writ may be summarized as follows:

(1) The lower courts are now in disharmony; and the decision of the Circuit Court of Appeals is a flagrantly incorrect interpretation of the law.

(2) The decision flies in the face of the holdings by the Supreme Court with regard to deductions where charity is involved.

(3) The decision flies in the face of holdings by the Supreme Court about cases that are peculiarly within the authority of the Tax Court.

(4) This case is an important one involving, as it

does, every estate and trust in which charity is a beneficiary and where capital gains are realized.

Each of these will be discussed in sequential order.

(1) The lower courts are now in disharmony; and the decision of the Circuit Court of Appeals is a flagrantly incorrect interpretation of the law.

The Tax Court and the Circuit Court of Appeals are at loggerheads. The error of the Circuit Court of Appeals is easily established. There is no limit on the deduction for charity by a trust as long as the payment is of the trust's *gross* income. Section 162(a) puts it this way: "any part of the *gross* income, *without limitation*," that goes to charity.

The Circuit Court of Appeals, pointing to Section 117(a)(4) and (5), says that a part of a capital gain does not constitute gross income. However, Section 117 has nothing to do with *gross* income. It has to do solely with the extent to which capital gains are taken into account in computing *net* income. The very language italicized by the Circuit Court of Appeals in quoting the statutory definition of a long term capital gain shows this: "gain from the sale or exchange of a capital asset held for more than 18 months, if and to the extent such gain is taken into account in computing *net* income."

Section 22(a) defines gross income as including "gains or profits and income derived from any source whatever." Section 22(f) says the amount of the gains is controlled by Section 111. The latter section says that gains are the *entire* difference between sales price and cost.

Section 22(b) labels all the exclusions from gross

income. The adjustment for capital gains is not among the exclusions. That adjustment is set forth in another section entirely—Section 117—and is labeled as a percentage that “shall be taken into account” in computing *net* income. Nothing in Section 22 defining gross income, or anything related to Section 22 says or even intimates, that capital gains are not *wholly* part of gross income.

Congress knew how to provide for a limitation when a limitation was desired. It showed this when it came to deductions and the effect of capital losses. Section 23 enumerates the allowable deductions. Section 23(g)(1) deals with the deduction for capital losses and limits the deduction “to the extent provided in Section 117”. When it came to the definition of gross income in Section 22, no such limitation was expressed by Congress. This makes it clear that no such limitation was intended.

The Tax Court was so clear on all this that it did not feel justified in reconsidering the opinion, or even having it reviewed by the full court. Motions toward this end were denied (R. 2).

The Circuit Court of Appeals decision can only be explained on the inference it must have drawn that if an income item is not part of net income, it is also not part of gross income. The tax statute is not that facile or symmetrical. It has its own peculiar structure. It provides for credits “against” net income (Section 163) and amounts not “taken into account” in computing net income (Section 117), without in any way touching deductions or gross income.

The Circuit Court of Appeals cites three cases—*Grey*, *Maloy*, and *Green*, all decided by the Tax Court. The *Grey* and *Maloy* cases are thoroughly

dealt with in the Tax Court's opinion in the present case (R. 7-9, 11). The *Grey* case involved tax-free income specifically listed as an exclusion from gross income in Section 22(b)(4). The *Maloy* case had to do with the concept of "gross income stated in the return". The *Green* case has no bearing here. It holds that capital losses, being deductions, do not affect the amount of *gross income*.

The Circuit Court of Appeals fell into flagrant error when it reduced the deduction for charity by eliminating from gross income an amount that has to do solely with the computation of net income. As a simple matter of corrective justice, the Supreme Court should take the case unto itself.

(2) The decision flies in the face of the holdings by the Supreme Court with regard to deductions where charity is involved.

The soundness of petitioners' position is crystal clear. But even if it were only doubtful, the benefit of the doubt would have to be resolved in favor of the deduction, because the deduction involves aid to charity. The approach is succinctly stated in *Estate of J. B. Whitehead*, 3 T. C. 48, where Section 162(a), the same one with which we are here dealing, was up for interpretation. The Tax Court said:

"Although the petitioner has the burden of showing its right to the deductions claimed, the element of charity requires liberal construction. *Helvering v. Bliss*, 293 U. S. 144; *Old Colony Trust Co. v. Commissioner*, 301 U. S. 379; *Edwards v. Slocum*, 264 U. S. 61."

In the *Old Colony Trust Co.* case, the Supreme Court construed Section 162(a) as allowing deductions to the full extent of the gross income, even though the taxpayer saved, and the revenues were impaired, thereby. It held that the "language should be construed with the view of carrying out the purpose of Congress—evidently the encouragement of donations by trust estates. * * * The design was to forego some possible revenue in order to promote aid to charity."

Directional beams also come from the *Bliss* case. There too, the question was the relationship between capital gains and the deduction for contributions, this time in the case of an individual under the 1928 Act. The Court said:

"If the meaning of the act were doubtful, we should still reach the same conclusion. The exemption of income devoted to charity and the reduction of the rate of tax on capital gains were liberalizations of the law in the taxpayer's favor, were begotten from motives of public policy, and are not to be narrowly construed."

None of these principles was observed by the Circuit Court of Appeals. Instead, it reached its conclusion by an interpretation erroneous in point of law, and narrow and illiberal from the standpoint of charities. The Circuit Court of Appeals decision, instead of aiding charities, will obviously militate against them, because of the disallowance to estates and trusts of the tax deduction.

(3) The decision flies in the face of holdings by the Supreme Court about cases that are peculiarly within the authority of the Tax Court.

This case is one peculiarly within the authority of the Tax Court, and a proper case to apply *Dobson v. Commissioner*, 320 U. S. 489, in which Mr. Justice Jackson, for a unanimous court, laid down the principle that a decision of the Tax Court should be upheld if it has "warrant in the record and a reasonable basis in the law."

Petitioners maintain that the decision of the Tax Court in this case is sound and that there is no mistake of fact, law, or anything else. But even if, on review, the appellate court could entertain a reasonable difference in legal opinion from the Tax Court, this is not the sort of case where the appellate court could substitute its interpretation for that of the Tax Court.

Brooklyn National Corporation v. Commissioner, 157 F. (2d) 450 (C. C. A. 2), *cer. den.* 67 S. Ct. 96, is directly in point. Note the comparable setting of the two cases: In the present case, the problem has to do with whether the deduction for charities is curbed by the limitation on the inclusion of capital gains in computing net income. In the *Brooklyn National* case, the problem had to do with whether the credit for dividends paid was curbed by the limitation on the deduction of capital losses in computing net income.

Here are pertinent parts from the opinion in the *Brooklyn National* case:

"As we understand it, before we may substitute

our own interpretation of a provision of the Revenue Act, not only must a naked question of law detach itself from the nexus of law and fact in the record as a whole; but we must conclude that the Tax Court has been indubitably wrong in its decision of the question which emerges: reasonable differences in legal opinion we are to resolve in its favor.

"It seems to us that the right answer * * * here is not so certain that we should be justified in following our own beliefs; and therefore, although personally we are of the same mind as before, we think that we should yield to the insistence of the Tax Court, which within these limits is really the court of last appeal.

"* * * the Supreme Court * * * made clear * * * how straitly our jurisdiction is confined. * * * by assuming jurisdiction to consider the question at all, we invaded the prerogative of the Tax Court and disregarded the finality of its orders. That finality depends, as we understand, upon the added competency which inevitably follows from concentration in a special field."

These principles were reaffirmed in *American Coast Line v. Commissioner*, 159 F. (2d) 665 (C. C. A. 2). The setting was different from the *Brooklyn National* case and involved a more legalistic question. The question had to do with the jurisdiction of the Tax Court on an application for excess profits tax relief under Section 722(d) of the Internal Revenue Code. This Court declared:

"Finally, so far as concerns our review of the Tax Court as distinct from its own decision as

to its jurisdiction, the case seems to us especially proper for the application of the doctrine that, even as to matters of law unmingled with fact, we are to yield our conviction to the contrary is strong. * * * It is of course not our province to fix the distribution of judicial power; least of all are we in a position to measure the higher authority which the Tax Court's constant occupation in its special field should give to its rulings, as distinct from ours in our sprawling jurisdiction."

Of like opinion is the Sixth Circuit in *Commissioner v. Wiesler*, 161 F. (2d) 997.

In the light of the parallel issue with the *Brooklyn National* case, and the doctrine laid down in that and the *American Coast Line* and *Wiesler* cases, the decision of the Tax Court in the present appeal calls for the stamp of approval and finality.

This point was briefed and argued to the Circuit Court of Appeals by both parties, but completely ignored by that court when it rendered its opinion. There was thus a clear and unwarranted flight from the pronouncements of the Supreme Court in the *Dobson* case.

Considering that the *Brooklyn National* and *American Coast Line* cases were decided by the Second Circuit itself, the unusual situation may perhaps be explained by what took place at the oral argument of the present case before the Circuit Court of Appeals. The judges said frankly that they could not tell where things stood on the *Dobson* principle in the light of the Supreme Court's decision in *Crane v. Commissioner of Internal Revenue*, 67 S. Ct. 1047.

The judges added that they were in hopes of future clarification by the Supreme Court. The granting of the present petition may afford an opportunity to impart that clarification.

(4) This case is an important one involving, as it does, every estate and trust in which charity is a beneficiary and where capital gains are realized.

If the Circuit Court of Appeals is right, the tax status of every estate and trust that has capital gains and where amounts go to charity, may be adversely affected. The case has been the subject of comment by the leading tax services and tax letters. Several of the large trust companies, and several tax lawyers have expressed concern about the case to petitioners' counsel.

Wherefore, petitioners pray that this petition for a writ of certiorari be granted.

October, 1947.

J. S. SEIDMAN,
Counsel for Petitioners.

INDEX

	Page
Opinions below.....	1
Jurisdiction.....	1
Question presented.....	2
Statutes and regulations involved.....	2
Statement.....	2
Argument.....	4
Conclusion.....	8
Appendix.....	10

CITATIONS

Cases:

<i>Bingham, Trust of v. Commissioner</i> , 325 U. S. 365.....	8
<i>Crane v. Commissioner</i> , 331 U. S. 1.....	8
<i>Commissioner v. Wilcox</i> , 327 U. S. 404.....	8
<i>Dobson v. Commissioner</i> 320 U. S. 489, rehearing denied, 321 U. S. 231.....	8
<i>Frank Trust of 1931 v. Commissioner</i> , 145 F. 2d 411.....	5
<i>Green v. Commissioner</i> , 7 T. C. 263.....	7
<i>Grey v. Commissioner</i> , 41 B. T. A. 234, affirmed, 118 F. 2d 153.....	7
<i>Helvering v. Bliss</i> , 293 U. S. 144.....	8
<i>Maloy v. Commissioner</i> , 45 B. T. A. 1104.....	7
<i>Old Colony Co. v. Commissioner</i> , 301 U. S. 379.....	8

Statutes:

Internal Revenue Code:

Sec. 21 (26 U. S. C. 1940 ed., Sec. 21).....	7, 10
Sec. 22 (26 U. S. C. 1940 ed., Sec. 22).....	5, 6, 7, 10
Sec. 23 (26 U. S. C. 1940 ed., Sec. 23).....	5, 6, 7, 10
Sec. 117 (26 U. S. C. 1940 ed., Sec. 117).....	5, 6, 7, 11
Sec. 161 (26 U. S. C. 1940 ed., Sec. 161).....	12
Sec. 162 (26 U. S. C. 1940 ed., Sec. 162).....	5, 7, 13

Revenue Act of 1934, c. 277, 47 Stat. 680, Sec. 117.....	6
--	---

Miscellaneous:

H. Rep. No. 704, 73d Cong., 2d Sess. (1939-1 Cum. Bull. (Part 2) 554.....	6
S. Rep. No. 558, 73d Cong., 2d Sess., (1939-1 Cum. Bull. (Part 2) 586.....	6
Treasury Regulations 103, Sec. 19.162-1.....	14

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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 408

TRUST UNDER AGREEMENT DATED DECEMBER 30,
1921, by JOHN E. ANDRUS, DECEASED (TRUST
No. 1), CENTRAL HANOVER BANK AND TRUST
COMPANY, HAMLIN F. ANDRUS, and WILLIAM
H. TAYLOR, TRUSTEES, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE SECOND
CIRCUIT*

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The Opinion of the Tax Court (R. 3-13) is reported at 7 T. C. 573. The opinion of the Circuit Court of Appeals (R. 15-20) is reported at 163 F. 2d 208.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on July 24, 1947. (R. 23.) The petition for a writ of certiorari was filed on Octo-

ber 20, 1947. The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether Section 22 (a) of the Internal Revenue Code includes in a taxpayer's gross income the percentage of long-term capital gain not required by Section 117 (b) to be taken into account in computing net income.

STATUTES AND REGULATIONS INVOLVED

The applicable provisions of the statute and regulations involved are set forth in the Appendix, *infra*, pp. 10-14.

STATEMENT

This case was submitted on a stipulation of facts (R. 13-14) together with documentary evidence; the Tax Court found the facts as stipulated (R. 3-5).

The taxpayers are the trustees under a trust agreement executed by John E. Andrus, since deceased, dated December 30, 1921. The trust was to continue during the lives of two designated persons and, during that time, the income of the trust was to be distributed in accordance with the provisions of the trust instrument. At the death of the survivor of these individuals, the corpus of the trust was to be distributed. (R. 3-4).

The trust agreement provided, among other things, that the trustees were to pay forty-five

percent of the trust's net income (computed in accordance with the provisions of the trust) to the Surdna Foundation, Inc. The balance of the income of the trust was to be distributed among a number of beneficiaries whose incomes were subject to income tax. (R. 4.)

The Surdna Foundation, Inc., is a New York corporation organized for exclusively charitable purposes. Under the provisions of the trust agreement forty-five percent of the trust's net income for the year 1941 was paid or permanently set aside for the Surdna Foundation, Inc. (R. 4.)

During the year 1941, the long-term capital gain from assets held more than twenty-four months was \$87,406.39. The long-term capital loss from assets held more than eighteen months but not more than twenty-four months was \$2,461.25. Income other than capital gains was \$16,769.39. Deductions other than contributions totaled \$19,224.01. The total net long-term capital gain was \$84,945.14. The net income of the trust prior to deductions for contributions was \$82,490.52. (R. 5.)

In the income tax return for 1941, the taxpayers computed the excess of gross income over deductions to be \$92,087.59 and claimed as a deduction for income set aside for Surdna Foundation, Inc., forty-five percent thereof, or \$41,439.42. The taxpayers agreed before the Tax Court that the income of the trust after payment

of expenses was \$82,490.52 and claimed as a deduction for income set aside for Surdna Foundation, Inc., forty-five percent of this amount or \$37,120.74. (R. 5.)

The Commissioner determined a deficiency in income tax for the year 1941 in the amount of \$5,691.90. This resulted, in part, from his determination that a portion of the amount set aside for the Surdna Foundation, Inc., could not be deducted in full under Section 162 (a) of the Internal Revenue Code on the ground that it was not made entirely out of the gross income of the trust. The taxpayers, on the other hand, claimed an overpayment of income tax. (R. 5-6.)

The Tax Court ruled that the payment in question was deductible in full and, accordingly, that there had been an overpayment of tax in the amount of \$115.71. (R. 5-13.) The Circuit Court of Appeals reversed, holding with the Commissioner that the taxpayer had gross income only to the extent that its capital gains were required by Section 117 (b) to be taken into account in the computations of its net income and that its charitable deduction must be limited to the amount which came from its gross income. (R. 15-20.)

ARGUMENT

1. The decision below is correct and is based on a proper interpretation of the statutory provisions involved. The pivotal issue on which the

case turns is whether the gross income of a trust under Section 22 (a) of the Internal Revenue Code, (Appendix, *infra*), includes the percentage of long-term capital gains which is not required to be taken into account in the computation of net income under Section 117 (b) of the Internal Revenue Code, (Appendix, *infra*). If, as the court below held, Congress did not intend that gross income under Section 22 (a) should include the percentage of capital gains which, in effect, are ignored by Section 117, it is not disputed that the decision on the ultimate question is correct, namely, that the amount deductible by the taxpayer for charitable contributions under Section 162 (a), (Appendix, *infra*), must be limited to the payments which came from its gross income (calculated without reference to the percentage of long-term capital gain not taken into account in the computation of its net income). (Pet. 6.) Indeed, Section 162 (a) is clear that, to the extent that charitable payments do not come out of gross income, no deduction may be had. *Frank Trust of 1931 v. Commissioner*, 145 F. 2d 411 (C. C. A. 3d).¹

¹ Section 162 (a) provides that the deduction is to be "without limitation." As the court below pointed out (R. 19-20), this phrase serves to distinguish the deduction for trusts from that for individuals which is limited to fifteen per cent of net income under Section 23 (o). It is not disputed that the court below was correct in its view that the "without limitation" clause does not permit the trust to take a deduction to the extent that payments do not come out of its gross income.

The provisions of Section 117, its legislative history, and the scheme of the entire statutory pattern confirm the court below in its construction of the statutory provisions. The device of taxing capital gains by taking only a specified percentage into account in computing the tax (depending on the length of time the asset is held) dates from the adoption of Section 117 of the Revenue Act of 1934, c. 277, 47 Stat. 680. The committee reports are clear to the effect that a taxpayer would include in "gross income" only the percentage of capital gain to be taken into account in the computation of net income and that a taxpayer was considered as measuring his "gain" only to the extent that the capital gain was required to be taken into account. H. Rep. No. 704, 73d Cong., 2d Sess., pp. 10, 31-32 (1939-1 Cum. Bull. (Part 2) 554, 562, 578); S. Rep. No. 558, 73d Cong., 2d Sess., pp. 11-13 (1939-1 Cum. Bull. (Part 2) 586, 594-596). The very definition in Section 117 (a) (4) of the Internal Revenue Code shows that the measure of the "gain" is the extent to which it is required to be taken into account under Section 117 (b). To the extent that capital gains are not so measured, there are no "gains" under Section 22 (a). Further, "net income" under Section 21 (Appendix, *infra*) is defined as gross income under Section 22 less the deductions permitted by Section 23 (Appendix, *infra*). Since Section 23 does not grant

a deduction for the percentage of capital gains not taken into account under Section 117, it is manifest that this portion of the gains must be excluded under Section 22 (a) in order that there may be an exclusion from net income under Section 21. The deduction under Section 23 (g) (1) for capital losses (to the extent taken into account) is a necessary one for, under the statutory pattern, there is no other way of reducing net income on account of such losses. (See Pet. 7.) The same is not true of gains, for here Section 22 (a), by excluding the portion not taken into account, accomplishes the purpose desired by Congress.

2. The decision below, in its construction of Sections 22 (a) and 117, is the first judicial determination of this matter and, consequently, does not conflict with any decision of this Court or of any other Circuit Court of Appeals. Furthermore, the reversal of the Tax Court here brings the decision in harmony with previous decisions of the Tax Court where the relationship between Sections 22 (a) and 117 was in issue. *Maloy v. Commissioner*, 45 B. T. A. 1104; *Green v. Commissioner*, 7 T. C. 263; see also *Grey v. Commissioner*, 41 B. T. A. 234, affirmed, 118 F. 2d 153 (C. C. A. 7th).

There is no issue in this case concerning the proper interpretation of Section 162 (a) and the scope of the charitable deductions permitted there-

under. Consequently, *Old Colony Co. v. Commissioner*, 301 U. S. 379, and *Helvering v. Bliss*, 293 U. S. 144 (Pet. 8-9), dealing with the liberal construction to be given to the sections affording charitable deductions, are quite beside the point. Moreover, it is appropriate to observe that Congress has nowhere indicated an intention that a trust making a charitable contribution (or its taxable beneficiaries) should obtain an added tax windfall merely because, as here, the income of the trust is largely composed of capital gain.

3. The Circuit Court of Appeals was not precluded from reversing the Tax Court by *Dobson v. Commissioner*, 320 U. S. 489, rehearing denied, 321 U. S. 231. The only issue on review concerned the proper construction of the statutory provisions discussed above. The determination of the Circuit Court of Appeals here, as in *Crane v. Commissioner*, 331 U. S. 1, 15, “* * * announced rules of general applicability on clear-cut questions of law.” Accord: *Commissioner v. Wilcox*, 327 U. S. 404; *Trust of Bingham v. Commissioner*, 325 U. S. 365. Those cases plainly disprove the taxpayer’s assertions (Pet. 10-13) that the Circuit Court of Appeals was without authority to reverse the Tax Court.

CONCLUSION

The decision of the Circuit Court of Appeals is correct. No conflict in decisions is presented

for resolution by this Court. Accordingly, further review of the case is not warranted.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.

✓ | THERON LAMAR CAUDLE,
Assistant Attorney General.

HELEN R. CARLOSS,

HILBERT P. ZARKY,

Special Assistants to the Attorney General.

NOVEMBER 1947.

APPENDIX

Internal Revenue Code:

SEC. 21. NET INCOME.

(a) *Definition.*—"Net income" means the gross income computed under section 22, less the deductions allowed by section 23.

* * * *

(26 U. S. C. 1940 ed., Sec. 21.)

SEC. 22. GROSS INCOME.

(a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages or compensation for personal service * * *, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

* * * *

(26 U. S. C. 1940 ed., Sec. 22.)

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * *

(g) *Capital Losses.*—

(1) *Limitation.*—Losses from sales or exchanges of capital assets shall be allowed only to the extent provided in section 117.

(26 U. S. C. 1940 ed., Sec. 23.)

* * * *

SEC. 117. CAPITAL GAINS AND LOSSES.

(a) *Definitions.*—As used in this chapter.

* * * * *

(2) *Short-Term Capital Gain.* — The term “short-term capital gain” means gain from the sale or exchange of a capital asset held for not more than 18 months, if and to the extent such gain is taken into account in computing net income;

(3) *Short-Term Capital Loss.*—The term “short-term capital loss” means loss from the sale or exchange of a capital asset held for not more than 18 months, if and to the extent such loss is taken into account in computing net income;

(4) *Long-Term Capital Gain.*—The term “long-term capital gain” means gain from the sale or exchange of a capital asset held for more than 18 months, if and to the extent such gain is taken into account in computing net income;

(5) *Long-Term Capital Loss.*—The term “long-term capital loss” means loss from the sale or exchange of a capital asset held for more than 18 months, if and to the extent such loss is taken into account in computing net income;

(6) *Net Short-Term Capital Gain.*—The term “net short-term capital gain” means the excess of short-term capital gains for the taxable year over the sum of (A) short-term capital losses for the taxable year, plus (B) the net short-term capital loss of the preceding taxable year (if beginning after December 31, 1937), to the extent brought forward to the taxable year under subsection (e);

(7) *Net Short-Term Capital Loss*.—The term “net short-term capital loss” means the excess of short-term capital losses for the taxable year over the short-term capital gains for such year;

(8) *Net Long-Term Capital Gain*.—The term “net long-term capital gain” means the excess of long-term capital gains for the taxable year over the long-term capital losses for such year;

(9) *Net Long-Term Capital Loss*.—The term “net long-term capital loss” means the excess of long-term capital losses for the taxable year over the long-term capital gains for such year.

(b) *Percentage Taken Into Account*.—In the case of a taxpayer, other than a corporation, only the following percentages of the gain or loss recognized upon the sale or exchange of a capital asset shall be taken into account in computing net income:

100 per centum if the capital asset has been held for not more than 18 months;

66 $\frac{2}{3}$ per centum if the capital asset has been held for more than 18 months but not for more than 24 months;

50 per centum if the capital asset has been held for more than 24 months.

* * * *

(26 U. S. C., 1940 ed., Sec. 117.)

SEC. 161. IMPOSITION OF TAX.

(a) *Application of Tax*.—The taxes imposed by this chapter upon individuals shall apply to the income of estates or of any kind of property held in trust, including—

* * * *

(b) *Computation and Payment*.—The tax shall be computed upon the net income

of the estate or trust, and shall be paid by the fiduciary, except as provided in section 166 (relating to revocable trusts) and section 167 (relating to income for benefit of the grantor).

* * * * *

(26 U. S. C., 1940 ed., Sec. 161.)

SEC. 162. NET INCOME.

The net income of the estate or trust shall be computed in the same manner and on the same basis as in the case of an individual, except that—

(a) There shall be allowed as a deduction (in lieu of the deduction for charitable, etc., contributions authorized by section 23 (o)) any part of the gross income, without limitation, which pursuant to the terms of the will or deed creating the trust, is during the taxable year paid or permanently set aside for the purposes and in the manner specified in section 23 (o), or is to be used exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, or for the establishment, acquisition, maintenance or operation of a public cemetery not operated for profit;

(b) There shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year which is to be distributed currently by the fiduciary to the beneficiaries, and the amount of the income collected by a guardian of an infant which is to be held or distributed as the court may direct, but the amount so allowed as a deduction shall be included in computing the net income of the beneficiaries whether

distributed to them or not. Any amount allowed as a deduction under this paragraph shall not be allowed as a deduction under subsection (c) of this section in the same or any succeeding taxable year;

* * * * *

(26 U. S. C. 1940 ed., Sec. 162.)

Treasury Regulations 103, promulgated under the Internal Revenue Code:

SEC. 19.162-1. *Income of estates and trusts.*—* * *

From the gross income of the estate or trust there are also deductible (either in lieu of, or in addition to, the deductions referred to in the preceding paragraph of this section) the following:

(1) Any part of the gross income of the estate or trust for its taxable year which, by the terms of the will or of the instrument creating the trust, is paid or permanently set aside during such year for the charitable, etc., uses or purposes referred to or described in section 162 (a). This deduction is in lieu of that authorized by section 23 (o) in the case of individual taxpayers.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1947.

No. 408.

TRUST UNDER AGREEMENT DATED DECEMBER 30, 1921
BY JOHN E. ANDRUS, DECEASED (TRUST NO. 1),
CENTRAL HANOVER BANK AND TRUST COMPANY,
HAMLIN F. ANDRUS, and WILLIAM H. TAYLOR,
Trustees,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

REPLY BRIEF FOR PETITIONERS.

J. S. SEIDMAN,
Counsel for Petitioners,
80 Broad Street,
New York 4, N. Y.



IN THE
Supreme Court of the United States
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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
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REPLY BRIEF FOR PETITIONERS.

Respondent divides his argument into three numbered parts. This reply memorandum will be numbered to correspond with those respective parts.

(1) Respondent says (p. 6) that the legislative history of Section 117 shows that gross income includes only the income percentage taken into account. There is nothing in the legislative history that shows any such thing and the fact that there is not, is itself significant in opposition to the respondent's argument and the decision below, since both seek to controvert

the clear wording of the statute. There is a reference in one Committee report to "gross income *subject to tax*", but that is of course to *taxable* gross income, which is an entirely different concept from unqualified and statutorily defined "gross income", as the opinion of the Tax Court points out (R. 9).

Respondent also argues (pp. 6-7), that the portion of capital gain not taken into account in computing *net* income must likewise come out of *gross* income. This argument was anticipated on page 7 of the petition and is there answered. Respondent assumes an amiable arithmetic pattern that the tax statute itself denies.

(2) Respondent points out (p. 7) that this case is the first judicial determination of the matter. Respondent is correct. It is the first, and because of its importance and scope, it calls for the voice of this Court at this very stage, to eliminate the strife that is otherwise sure to be engendered.

Respondent says (p. 7) the decision below puts the case in harmony with other decisions of the Tax Court. The Tax Court would hardly think so. The Tax Court premised its opinion in the present case on those very decisions on the strength of either their likeness or differences.

Respondent also says (pp. 7-8) that the Supreme Court opinions about liberal construction where charity is involved do not apply because Section 162(a) is not here involved for interpretation. That is an amazing contention. This whole case pivots around Section 162(a). Besides, there is nothing about the Supreme Court's pronouncements that limit to Section 162(a) the doctrine of liberal construction

to charity. To the contrary, its opinions show that for *all* tax purposes, charities are to be favored.

On page 8, respondent makes reference to a tax windfall. There is no such thing involved here unless that is the characterization to be applied to the express mandate of the statute. Congress wanted one-half the capital gains to be free of tax to everybody. Congress also wanted to favor charity. Respondent's argument and the decision below do neither.

(3) Respondent says (p. 8) that the principle of the *Dobson* case is inapplicable because we are here dealing with a clean-cut question of law. Actually, the question we have here is of the very nature for which the court below had previously said the *Dobson* doctrine was shaped. (See pp. 10-12 of petition.)

It is undisputed that *all estates and trusts in which charity is a beneficiary and capital gains are realized have a stake in this case*. For the reasons outlined in the petition and supplemented here, petitioners renew their prayer that a writ of certiorari be granted.

November 1947.

J. S. SEIDMAN,
Counsel for Petitioners.

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FILED
MAY 19 1948

CHARLES CLARK
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1947.
No. 408.

TRUST UNDER AGREEMENT DATED DECEMBER 30, 1921
BY JOHN E. ANDRUS, DECEASED (TRUST No. 1),
CENTRAL HANOVER BANK AND TRUST COMPANY,
HAMLIN F. ANDRUS, and WILLIAM H. TAYLOR,
Trustees,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

**MOTION TO EXTEND TIME ALLOWED FOR
FILING PETITION FOR REHEARING.**

J. S. SEIDMAN,
Counsel for Petitioners,
80 Broad Street,
New York 4, N. Y.



IN THE
Supreme Court of the United States
OCTOBER TERM, 1947.
No. 408.

TRUST UNDER AGREEMENT DATED DECEMBER 30, 1921
BY JOHN E. ANDRUS, DECEASED (TRUST NO. 1),
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**MOTION TO EXTEND TIME ALLOWED FOR
FILING PETITION FOR REHEARING.**

Now come the Petitioners in the above entitled proceeding and move this Honorable Court to extend the time for filing a petition for rehearing until December 31, 1948.

In that connection, Petitioners respectfully call to the attention of this Honorable Court that the Petition for Writ of Certiorari was filed with this Court after the Circuit Court of Appeals reversed the decision of The Tax Court of the United States. This Court denied the petition on November 24, 1947. A motion to extend the time allowed for filing a petition for rehearing was denied on December 18, 1947.

At all these times there was no conflict in decisions presented for resolution by this Court since the point involved was a novel one, involving the manner in which the income tax deduction for the amount going to charity from a trust is to be computed. The potential for such conflict has since come into existence. On January 5, 1948, Helen W. Benedict, et al., as Trustees Under the Will of John E. Andrus, Deceased, a separate taxpayer, filed a complaint in the Court of Claims of the United States, Docket No. 48463, against the United States of America a defendant, involving the identical issue. Said action is about to be submitted to said Court on the basis of an agreed stipulation of facts and it is anticipated that a decision will be rendered by said Court prior to the end of this year.

In view of the pending action before the Court of Claims, the Tax Court granted Petitioners' motion to extend to June 30, 1948 the time for the submission of recomputations for the entry of judgment. In said motion, Petitioners avowed their intention to apply to this Honorable Court before the expiration of the present term, for leave to extend the time allowed for filing a petition for rehearing. The granting of such petition will, of course, enable the Tax Court to suspend entry of final judgment in the present proceeding, pending developments during the extended period.

While the amount in controversy in the present proceeding is \$5,807.61, this same issue pervades other years where several hundred thousand dollars of taxes are involved. That is what accentuates the importance of the present proceedings and this motion.

WHEREFORE, your Petitioners respectfully pray that the time for filing a petition for rehearing may be ex-

tended until December 31, 1948, and that your Petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

CENTRAL HANOVER BANK AND
TRUST COMPANY,
HAMLIN F. ANDRUS, and
WILLIAM H. TAYLOR,
*Trustees Under Agreement
Dated December 30, 1921 by
John E. Andrus, Deceased
(Trust No. 1), Petitioners,
By their Attorney,
J. S. SEIDMAN.*

Certificate of Counsel.

I, J. S. SEIDMAN, Counsel for the above named Petitioners, do hereby certify that the foregoing motion to extend the time allowed for filing a Petition for Rehearing of this case, is presented in good faith and not for delay.

Dated, New York, May 18, 1948.

J. S. SEIDMAN,
Counsel for Petitioners.